Supreme Court, U.S.
FILED
OCT 29 1991
OFFICE OF THE CLERK

No. 91-583

In the Supreme Court of the United States

OCTOBER TERM, 1991

HUGH H. BOSWORTH, JR., *et al.*,
PETITIONERS

v.

TIMOTHY J. LEATHERS, Commissioner of Revenues, *et al.*,
RESPONDENTS

ARKANSAS TELEPHONE ASSOCIATION, INC.,
INTERVENOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

BRIEF FOR RESPONDENT US SPRINT COMMUNICATIONS COMPANY LIMITED PARTNERSHIP

MICHAEL C. O'MALLEY
MITCHELL, WILLIAMS, SELIG, GATES & WOODYARD
320 West Capitol Avenue, Suite 1000
Little Rock, Arkansas 72201-3525
(501) 688-8800

Counsel of Record for Respondent

DANIEL E. DOHERTY CHARLES R. WUNSCH

MARION W. O'NEILL

UNITED TELECOMMUNICATIONS, INC.

QUESTIONS PRESENTED

US Sprint Communications Company Limited Partnership ("US Sprint") is responding only to Question 1 of Petitioner's Petition.

1. Does the exemption from the Arkansas Sales Tax of wide-area telephone service ("WATS") deny subscribers to regular long-distance telephone service ("MTS"), which is subject to the tax, equal protection of the law under the Fourteenth Amendment?

List of Parties and Rule 29.1 Statement

Respondent US Sprint concurs in Petitioner's list of the parties, but notes to the Court, in accordance with Rule 29.1, that US Sprint is a Delaware limited partnership owned[1] 80.1% by United Telecommunications, Inc., and 19.9% by GTE Corporation. US Sprint holds direct and indirect interests in subsidiary corporations, all of which it wholly owns[2] except for the following: (1) Plessey-Telenet, Limited, owned 49% by US Sprint, (2) Sprint Networks USSR, owned 50% by US Sprint, and (3) ACE Telemail International, Inc. (Japan), owned 35% by US Sprint.

[1]Ownership of US Sprint by its parent companies is through their ownership of the general and limited partners of US Sprint Communications Company Limited Partnership. In particular, United Telecommunications, Inc., owns 100% of US Sprint's general partner, US Telecom, Inc., which owns a 50% interest in the partnership. US Sprint has two corporate limited partners: (1) UCOM, Inc., owning a 30.1% partnership interest and owned 100% by United Telecommunications, Inc., and (2) GTE Communications Services Incorporated, owning a 19.9% partnership interest and owned 100% by GTE Corporation.

[2]Some of US Sprint's foreign subsidiaries are required by local law to have a number of shares owned by members of the board of directors. US Sprint regards these as "wholly owned" for purposes of this statement.

Table of Contents

Questions Presented i

List of Parties and Rule 29.1 Statement ii

Table of Contents iii

Table of Authorities iv

Statement of the Case 1

Reasons for Denying the Petition 1

I. Retail sales tax statutes typically include exceptions to the tax to support important structural features of the tax. Among these are exceptions to preserve the retail nature of the tax, to preserve the constitutionality of the tax, to avoid double taxation, to aid in administration of the tax, and to promote a variety of legislative policies. 3

II. The sales tax exception at issue before the Wisconsin Supreme Court in *GTE Sprint* was an exception to preserve the retail nature of the Wisconsin Sales Tax. 6

III. The sales tax exception at issue before the Arkansas court below was an exception to promote a policy of the Arkansas legislature and is, therefore, not comparable to the Wisconsin decision. 9

Conclusion 14

Cases:

Allied Stores of Ohio v. Bowers,
358 U.S. 522 (1959) 2, 11–12

Bosworth v. Pledger,
810 S.W.2d 918 (Ark. 1991) 1, 10–12

Carmichael v. Southern Coal & Coke Company,
301 U.S. 495 (1936) 2

GTE Sprint Communications, Inc. v. Wisconsin Bell, Inc.,
454 N.W.2d 797 (Wis. 1990) 2, 6–9

Heneford v. Silas Mason Co.,
300 U.S. 577 (1937) 3

Lenhausen v. Lakeshore Auto Parts,
410 U.S. 356 (1973) 2

McGoldrick v. Berwind-White Coal Co.,
309 U.S. 33 (1939) 3

Sattelink of Chicago v. Chicago,
523 N.E.2d 13 (Ill. App. 1 Dist. 1988) 2

Stewart Dry Goods Co. v. Lewis,
294 U.S. 550 (1935) 3

Constitutional Provisions:

U.S. Constitution,
amend. XIV, §1 . . . . . passim

Statutory Provisions:

Ark. Code Ann.,
§26-52-301 4

Ark. Code Ann.,
§26-52-307 4

Ark. Code Ann.,
§26-52-401 4–5

Ark. Code Ann.,
§26-52-405 4

Ark. Code Ann.,
§26-52-406 6

Ark. Code Ann.,
§26-52-407 6

Ark. Code Ann.,
§26-52-408 4
Ark. Code Ann.,
§26-52-412 6
Ark. Code Ann.,
§26-52-413 5
Ark. Code Ann.,
§26-52-414 5
Ark. Code Ann.,
§26-52-415 6
Wis. Stat.,
§77.51 8
Wis. Stat.,
§77.52 . . . . . 3–4, 7–8
Wis. Stat.,
§77.535 4
Wis. Stat.,
§77.54 4–6

Supreme Court Rules:

Sup. Ct.,
Rule 10.1(a) 1, 2
Sup. Ct.,
Rule 10.1(b) 1, 2
Sup. Ct.,
Rule 10.1(c) 1, 2

No. 91-583

In the

Supreme Court of the United States

OCTOBER TERM, 1991

HUGH H. BOSWORTH, JR., *et al.*,
PETITIONERS

v.

TIMOTHY J. LEATHERS, Commissioner of Revenues, *et al.*,
RESPONDENTS

ARKANSAS TELEPHONE ASSOCIATION, INC.,
INTERVENOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

BRIEF FOR RESPONDENT US SPRINT COMMUNICATIONS COMPANY LIMITED PARTNERSHIP

US Sprint Communications Company Limited Partnership ("US Sprint") respectfully requests that this Court deny the Petition for a Writ of Certiorari seeking review of the Supreme Court of Arkansas' opinion in this case. That opinion is reported at 305 Ark. 598, 810 S.W.2d 918.

STATEMENT OF THE CASE

US Sprint concurs in the statement of the case as set out by Respondent State of Arkansas in its brief in response to the Petition.

REASONS FOR DENYING THE PETITION

Petitioner contends that there are important reasons under Rule 10.1(a), (b), and (c) for the Court to grant a writ of certiorari in this case. Petition 14. The Petition, however, fails to support

this contention with respect to Question 1. First, Petitioner does not even attempt to demonstrate a conflict among the federal courts of appeal under Rule 10.1(a). This case involves a state court decision and Rule 10.1(a) is wholly inapplicable.

Second, Rule 10.1(c) is inapplicable because this case is not a case of first impression involving an question of federal law. The question[3] presented here is whether a tax preference to promote local economic development may tax some and not others without offending the Equal Protection Clause of the Fourteenth Amendment. This Court has said that such tax preferences do not offend the Equal Protection Clause on several occasions in the past. *See, e.g., Lenhausen v. Lake Shore Auto Parts*, 410 U.S. 356 (1973)(upholding taxation of corporations but exemption of individuals from Illinois ad valorem personal property tax); *Allied Stores of Ohio v. Bowers*, 358 U.S. 522 (1959)(upholding exemption from Ohio ad valorem tax of goods stored in warehouses by non-residents but not by residents); *Carmichael v. Southern Coal & Coke Company*, 301 U.S. 495 (1936) (upholding Alabama's unemployment tax even though it exempted small employers and employers in certain industries).

Finally, Petitioner argues that a conflict exists among the states under Rule 10.1(b) of sufficient importance for this Court to resolve. Petitioner's citation of *Sattelink of Chicago v. Chicago*, 523 N.E.2d 13 (Ill. App. 1 Dist. 1988), does not show such a conflict, however, because it does not represent a decision of that state's highest court as required by Rule 10.1(b). What remains is Petitioner's contention that the decision of the Arkansas Supreme Court in this case so conflicts with the decision of the Wisconsin Supreme Court in *GTE Sprint Communications Corporation v. Wisconsin Bell*, 454 N.W.2d 797 (Wis. 1990), to merit review by this Court. US Sprint responds to this aspect of the Petition because of its involvement in both cases and its conviction that no such conflict exists.

Petitioner contends that *GTE Sprint* involves "virtually the same factual situation" as this case. Petition 14. This is not true. To show how dissimilar these two cases are, US Sprint will briefly discuss certain structural features of retail sales taxes

[3]It may be that Petitioner cites Rule 10.1(c) in connection with Question 2, regarding the Due Process challenge to Governor Clinton's appointment of special justices. However, because the Petition was unclear on this point, US Sprint assumes that Petitioner cited the Rule in support of granting writ of certiorari on both Questions.

generally and then discuss how these two cases address themselves to fundamentally different issues with respect to the sales tax statutes involved in each case.

I

RETAIL SALES TAX STATUTES TYPICALLY INCLUDE EXCEPTIONS TO THE TAX TO SUPPORT IMPORTANT STRUCTURAL FEATURES OF THE TAX. AMONG THESE ARE EXCEPTIONS TO PRESERVE THE RETAIL NATURE OF THE TAX, TO PRESERVE THE CONSTITUTIONALITY OF THE TAX, TO AVOID DOUBLE TAXATION, TO AID IN ADMINISTRATION OF THE TAX, AND TO PROMOTE A VARIETY OF LEGISLATIVE POLICIES.

After this Court clarified the permissible scope of retail sales taxes under the Equal Protection and Commerce Clauses[4], the retail sales taxes (and their complementary use taxes)[5] enacted by most states have taken on a stereotypical structure, some of the features of which are relevant to distinguishing the Wisconsin and Arkansas decisions. First, sales taxes are typically only imposed at the "retail" or consumer level in the chain of commercial activity.[6] It is sometimes difficult to say whether a particular sales transaction is a retail transaction. For example, it is clear that restaurants are retailers of food, for their product is quite literally "consumed" by their customers. Yet it is difficult to say whether cooking grease purchased by a restaurant is consumed by the restaurant, by the resautrant's customer, or both. Both legislatures and courts may have to engage in some imaginative analysis to answer the very practical question of whether a restaurant must pay its supplier sales tax on its cooking grease purchases.

Second, sales taxes are typically imposed *comprehensively*

[4] *McGoldrick v. Berwind-White Coal Mining Co.*, 309 U.S. 33 (1939); *Heneford v. Silas Mason Co.*, 300 U.S. 577 (1937); *Stewart Dry Goods v. Lewis*, 294 U.S. 550 (1935).

[5] For purposes of this response, Respondent will use the term "sales tax" without regard to the distinctions between traditional sales taxes and gross receipts or privilege taxes. While those distinctions are important in some contexts, they are not relevant to the points made in this brief.

[6] *See, e.g.*, Ark. Code. Ann. §26-52-401(12); Wis. Stat. §77.52.

on sales of tangible personal property ("goods") but, *selectively*, if at all, on sales of services.[7] Where services are taxed, the statute will typically enumerate those services subject to the tax. As more states attempt to increase revenues from their sales taxes, they are experimenting with taxation of new classes of services. One of these services is telecommunications. It is not surprising, therefore, that states venturing into these areas, including Wisconsin and Arkansas, have and will be called upon to apply the settled principles of retail sales taxation to these new service industries. But this does not imply that every sales tax case involving telecommunications, or any other newly-taxed service, involves "virtually identical" factual or legal questions.

Finally, from the class of all goods and services subject to sales taxation, most states except various goods and services from taxation, either through definitional exceptions or through statutory exemptions. These exceptions often are crucial to the structure of the tax. In fact, most exceptions fall into one of a handful of categories.

1. *Wholesale exceptions.* Some exceptions exist to preserve the "retailness" of the tax, declaring certain sales to be wholesale rather than retail by legislative fiat.[8] These exceptions normally involve transactions in the grey area between wholesale and retail. For example, it is not uncommon to see an exception for sales of containers.

2. *Constitutionality exceptions.* Some exceptions exist to protect the tax from real or perceived (at the time of en-

[7] *See, e.g.*, Ark Stat. Ann. §26–52–301; Wis. Stat. §77.52.

[8] *See, e.g.*, Ark. Code Ann. §26–52–307 (declaring sales of construction materials to contractors to be retail sales, even though the materials are resold in the form of real estate); Ark. Code Ann. §26–52–401(12)(B)(exempting ingredients or components incorporated into manufactured products); Ark. Code Ann. §26–52–401(23) (exempting sales of unprocessed crude oil); Ark. Code Ann. §26–52–401(24) (exempting sales of electricity used in the manufacture of aluminum by the electrolytic process); Ark. Code Ann. §§26–52–404 and 26–52–405 (exempting feed used in raising livestock and poultry); Ark. Code Ann. §26–52–408 (exempting sales of certain packaging materials); Wis. Stat. §77.535(3m) (seed, fertilizer, pesticides, etc. exempt); Wis. Stat. §77.54(6)(b) (exemption for containers); Wis. Stat. §77.54(23m) (exemption for lease or sale of motion pictures to theaters—admission to theaters is taxable); Wis. Stat. §77.54(27) (exemption for sale of semen used for artificial insemination of livestock).

actment) challenges to the constitutionality of the tax.[9] Examples of this kind include are exemptions for interstate sales, exemptions for sales to federal agencies, and exemptions for sales of newspapers.

3. *Double tax exceptions.* Some exceptions prevent certain products from being subjected to tax under multiple taxing statutes. Sales of gasoline are often exempt from general sales taxes, because they are subject to an excise tax.[10]

4. *Administrative exceptions.* Some exceptions exist for administrative convenience.[11] A state may exempt casual sales among private individuals (a "garage sale" exception) to avoid the burden of fairly enforcing the tax on a large number of small sales. Likewise, sales taxes typically exempt sales to state agencies to avoid the absurd prospect of the state collecting the tax from itself.

5. *Policy exceptions.* Finally, the broadest group of exceptions exist to promote some policy important to the state legislature. Examples of such exceptions include exemptions for prosthetic devices, exemptions for sales to charitable organizations, enterprise zone exemptions, and so forth.[12]

---

[9] *See, e.g.*, Ark. Code Ann. §26–52–401(4) (exempting sales of newspapers); Ark. Code Ann. §26–52–401(5) (exempting sales to the United States); Wis. Stat. §77.54(1) (exempting sales the state is constitutionally prohibited from taxing); Wis. Stat. §77.55(1) (exempting sales to the federal government); Wis. Stat. §77.55(2) (exempting sales delivered out of state or to an exporter for delivery outside the United States); Wis. Stat. §77.54(15) (exempting sales of newspapers or periodicals).

[10] *See, e.g.*, Ark. Code Ann. §26–52–401(11) (exempting sales of motor fuels subject to motor fuels tax); Wis. Stat. §77.54(15) (exempting sales of motor fuels and aviation fuel taxed by Wis. Stat. ch. 78).

[11] *See, e.g.*, Ark. Code Ann. §26–52–401(17) (exempting "isolated sales" not made by an established business); Wis. Stat. §77.54(7) (exempting isolated or occasional sales).

[12] *See., e.g.*, Ark. Code Ann. §§26–52–401(1) to (3), (6) to (10), (21), (25) and 26–52–413 to 414 (exempting sales to various charitable organizations); Ark. Code Ann. §26–52–401(18)(C) to (D) (exempting sales of certain farm products directly to consumers); Ark. Code Ann. §26–52–401(19) (exempting sales of food to governmental agencies for free distribution); Ark. Code Ann. §26–52–401(20) (exempting certain sales of medical equipment); Ark. Code Ann. §26–52–401(27) (exempting sales of food purchased under certain governmental food assistance programs); Ark. Code Ann. §26–52–

II.

THE SALES TAX EXCEPTION AT ISSUE BEFORE THE WISCONSIN SUPREME COURT IN *GTE SPRINT* WAS AN EXCEPTION TO PRESERVE THE RETAIL NATURE OF THE WISCONSIN SALES TAX.

The *GTE Sprint* case involved an exception of the first kind, a definitional exception designed to preserve the retail nature of the tax by legislatively declaring certain sales of telecommunications services, namely "access" services, to be retail and others wholesale. As the Wisconsin court explained, *GTE Sprint*, 454 N.W.2d at 799, completion of a long-distance telephone call potentially involves three parties: (1) the local telephone company at the point of origination, (2) the long-distance telephone company, and (3) the local telephone company at the destination point. In order for a long-distance company to sell a long-

---

402 (exempting sales of machinery and equipment used directly in manufacturing); Ark. Code Ann. §26–52–403 (exempting certain sales of agricultural machinery and equipment); Ark. Code Ann. §26–52–406 (exempting sales of prescription medicine and medical oxygen); Ark. Code Ann. §26–52–407 (exempting sales of large river barges); Ark. Code Ann. §26–52–412 (exempting sales of admission to athletic and inter-scholastic events at primary and secondary schools); Ark. Code Ann. §26–52–415 (exempting sales of automobiles to blind veterans); Wis. Stat. §77.54(3) (exempting sales of certain agricultural equipment); Wis. Stat. §77.54(4) (exempting sales to elementary and secondary schools); Wis. Stat. §77.54(6)(a) (exempting certain sales of manufacturing equipment); Wis. Stat. §77.54(9) (exempting sales of admission to primary and secondary school events); Wis. Stat. §77.54(10) (exempting sales of admission to museums operated under agreement with the state historical societies); Wis. Stat. §77.54(14) (exempting sales of prescription medicine); Wis. Stat. §77.54(16) (exempting sales of fire-fighting equipment to volunteer fire departments); Wis. Stat. §77.54(20) (exempting sales of food and beverages); Wis. Stat. §77.54(21) (exempting sales of caskets); Wis. Stat. §77.54(22) (exempting sales of prosthetic devices); Wis. Stat. §77.54(24) (exempting sales of central office equipment to telephone companies); Wis. Stat. §77.54(26) (exempting sales of component parts incorporated into waste treatment facilities); Wis. Stat. §77.54(28) (exempting sales of diabetic care devices); Wis. Stat. §77.54(29) (exempting sales of equipment used in the production of maple syrup); Wis. Stat. §77.54(30) (exempting certain sales of home-heating fuels); Wis. Stat. §77.54(34) (exempting sales of dairy supplies); Wis. Stat. §77.54(35) (exempting sales of admission to American Legion baseball teams); Wis. Stat. §77.54(39) (exempting certain sales of off-highway heavy mechanical equipment).

distance phone call to its customers, it must purchase access to the local telephone companies at both the originating and terminating points. The long-distance company bundles this access with transmission between the two local service areas to provide its customer with an end-to-end long-distance connection. The long-distance consumer placing a long-distance telephone call is impervious to this series of sales and sees no indication on his bill that the sales took place: he simply receives a bill for the total price of the long-distance call.

The "long-distance" company might be one of the major long-distance companies ownimg national transmission facilities, such as AT&T, US Sprint, or MCI (the "facilities-based carriers" or the "interexchange carriers").[13] Or it might be a "reseller" of long-distance telephone service, a company that buys long-distance transmission in bulk from one of the facilities-based carriers, bundles it with access services purchased from local telephone companies, and sells end-to-end long-distance service to its customers. Finally, it is also possible that a local telephone company can provide originating access and transmission to the destination[14] but would have to purchase terminating access from another local telephone company at the terminating point. Thus, it possible that access would have to be purchased by (1) an inter-exchange carrier, (2) a reseller, or (3) a local telephone company, depending on which is providing the long-distance service to the customer.

The sales tax statute at issue in *GTE Sprint* imposed a sales tax on all retail sales of telephone service.[15] The defi-

[13]Strictly speaking, an "interexchange carrier" is any carrier that carries traffic between local telephone exchanges. In this brief, however, we use the term to describe only facilities-based carriers in order to be consistent with the manner in which the term is used in the Wisconsin provision at issue in *GTE Sprint*.

[14]Occasionally, a local telephone company can provide terminating access and transmission, but must buy originating access. Still the issue is the same whether it buys originating or terminating access.

[15]The Wisconsin sales tax imposed the tax on enumerated services, among them telecommunications services:

> Sec. 77.52(2). For the privilege of selling, performing, furnishing services described under par. (a) at retail in this state, a tax is hereby imposed at the rate of 5% of the gross receipts from the sale, performance or furnishing of the services.
>
> (a) The tax imposed herein applies to the following types of services:

nition of a "retail sale" under the Wisconsin statute specifically included "transfers of services *to an interexchange carrier* which permit the origination or termination of telephone messages between a customer in this state and one or more points in another local access and transport area ...." Wis. Stat. §77.51(14)(m)(emphasis added). By implication, such sales to long-distance providers who were not "interexchange carriers" were not considered "retail sales" and therefore not subject to the tax. *GTE Sprint*, 454 N.W.2d at 802. Thus, the Wisconsin sales tax imposed the tax on sales of access service to interexchange carriers (such as AT&T, US Sprint, and MCI) but not on sales of access to resellers or to local telephone companies.

The placement of the provision taxing sales of access—within the statute's definition of "retail sales"—indicates that the purpose of the legislature in distinguishing between sales of access to interexchange carriers and sales of access to resellers and local telephone companies was to draw a line between wholesale and retail sales of telecommunications services.[16] In other words, the Wisconsin legislature was attempting to preserve the retail nature of the tax.[17]

Having determined that the statute classified persons and having identified the governmental purpose sought to be advanced by the classification, the Wisconsin court then examined whether the classification advanced that purpose under

---

> 5. The sale of telecommunications services of whatever nature ...including interstate services originating in this state and charged to a subscriber or telephone located in this state.

[16]The Wisconsin Court found that the questioned provision was added by the legislature after the state's revenue department ruled that sales of access were not "retail" sales, regardless of the identity of the buyer. *GTE Sprint*, 454 N.W.2d at 802. Thus, the provision was added, in part, to replace the revenue that would be lost because of the department's ruling. *Id.* All taxing statutes have that purpose in common. But this could not be the reason for distinguishing between sales to interexchange carriers and sales to others.

[17]The court also considered the state's argument that the purpose of the provision was to resolve a conflict between two state agencies on the nature of sales of access. *Id.* On further examination, however, the court concluded that no such conflict existed but, if it did, the conflict was over the retail nature of sales of access services. So the purported second purpose of the legislation was in actuality a restatement of the first.

the rational basis test. The court concluded that there was no rational basis for distinguishing sales of access to interexchange carriers from such sales to others for the purpose of distinguishing wholesale from retail transactions:

> Local exchange carriers, inter-LATA [*i.e.*, interexchange] carriers and resellers all purchase and use access services for the same purpose, to originate or terminate telecommunications. Yet the legislature has arbitrarily chosen to define only the transfer of access services to an inter-LATA carrier as a "sale." But when the legislature acts, it must do so within the bounds of the constitution. Equal protection requires that because each are similarly situated, if the transfer of access services to inter-LATA carriers is to be taxed, the same transfer to local exchange carriers and resellers must be taxed as well. To the extent that inter-LATA carriers "use or consume" access services in providing telecommunications services to their customers, so do interexchange [*sic*, local exchange] carriers and resellers. The effect here is to treat similarly situated persons disparately without a rational basis to support the distinction.

Id. at 803. Nowhere did the state argue that the purpose of the provision was to advance a legislative policy of encouraging the business of resellers and local telephone companies to the exclusion of interexchange carriers, as it would have had to argue to make the Wisconsin case comparable to this case.

III.

THE SALES TAX EXCEPTION AT ISSUE BEFORE THE ARKANSAS COURT BELOW WAS AN EXCEPTION TO PROMOTE A POLICY OF THE ARKANSAS LEGISLATURE AND IS, THEREFORE, NOT COMPARABLE TO THE WISCONSIN DECISION

The case the Court is asked to review here can be called "virtually identical" to the *GTE Sprint* case only on the most impressionistic reading of the two cases. It is true, both cases

involve a sales tax on telecommunications and both present equal protection challenges to those statutes. But familial resemblance is not identity. The classifications challenged, the purposes advanced for those classifications, and the rationales connecting the classifications to the purposes are unmistakably different.

In this case[18], the Arkansas sales tax provides an exemption from the tax for "wide-area telephone service," also called WATS. Although the statute classifies *services* rather than *persons*, US Sprint accepts, solely for the purpose of responding to the Petition, that the classification of the services effectuates a classification of persons within the meaning of the Fourteenth Amendment.[19] Because of the rate structure of WATS service,[20] it is uneconomical for low-volume consumers of long-distance service to subscribe to WATS service. Thus, while there are no restrictions on who may subscribe to WATS service, subscribers to WATS are undoubtedly high-volume, largely commercial, subscribers. In the sense that there is a high probability that a WATS subscriber is a commercial concern, it might be said that the Arkansas exemption classifies persons.[21]

Having accepted Petitioner's argument that the statute classifies persons within the meaning of the Fourteenth Amendment, the Arkansas Supreme Court concluded that a legitimate purpose for enacting the exemption might have been the promo-

---

[18] *Bosworth v. Pledger*, 810 S.W.2d 918 (Ark. 1991)

[19] If the Court grants the Petition, however, Respondent reserves the right to contest this aspect of Petitioner's case on the merits as a subsidiary question fairly included within Question 1. The Arkansas Court stated that the statute's classification of *services* effectively classified the *subscribers* to those services:

> Although it is true that the tax is imposed on one type of long distance service and not another, it is also true that taxes are paid by individuals, and the record reflects that subscribers to "regular" long distance service pay the tax, while subscribers to WATS service do not. This disparate treatment under the statute of classes of individuals is sufficient to raise the equal protection challenge and require further analysis.

Bosworth, 810 S.W.2d at 921.

[20] WATS service is characterized by a flat monthly service fee charged irrespective of usage, plus a per-call charge at a rate lower than for regular message telephone service ("MTS"). *See* Petition n. 4(b) at 7.

[21] The Arkansas trial court found, and the Arkansas Supreme Court accepted, the finding that subscribers to WATS services, by economic force, tend to be commercial subscribers. *Id.* at 923.

tion of economic development within the state. And the court clearly said so:

> Testimony in the trial court indicated that WATS or WATS-like service tended to be used by large volume consumers of telephone service. It is not economically feasible to purchase WATS service unless the consumer has a large volume of telephone usage; thus the WATS customer is more likely to be a business subscriber than to be a residential subscriber.
>
> The State of Arkansas has a long history of providing tax incentives to commerce as a means to encourage businesses to stay and locate in this state, and, certainly, economic development is a legitimate and worthy governmental goal. For example, the "enterprise zone" legislation gives a tax advantage to industries that locate in economically depressed areas, Ark. Code Ann. §14–4–807 (Supp 1989), and the motion picture industry is accorded tax incentives in order to encourage film making in this state. Ark. Code Ann. §26–4–206 (1987), and §26–52–402(c)(3) (1987).
>
> The legislature may have intended, in the enactment of Section 2 of Act 27 of 1987, to encourage large volume users of telephone service, i.e., WATS subscribers, to remain or relocate in Arkansas.

Bosworth at 923.

This Court has emphasised that the Equal Protection Clause does not require the reviewing court to determine the *actual* purpose of the legislature in enacting a challenged classification; it need only find any legitimate purpose. The subjective motives of individual members of a legislature are often not expressed and may differ from member to member.

> We cannot assume that state legislative enactments were adopted arbitrarily or without good reason to further some legitimate policy of the State. What were the special reasons, motives or policies of the Ohio Legislature for adopting the questioned proviso we do not know, nor is it important that we should, *Southwestern Oil Co. v. Texas*, 217 U.S. 114, 126,

> for a state legislature need not explicitly declare its purpose.

Allied Stores of Ohio v. Bowers, 358 U.S. 522, 528 (1959).

After the Arkansas Supreme Court identified the classification and the purpose sought to be advanced by the purpose, it concluded that there was a rational basis for the legislature to conclude that the classification promoted that purpose.

> We agree with the chancellor's finding that this basis for legislation would be rationally related to achieving a legitimate governmental objective.

Bosworth at 923. The finding of the chancellor with which the Arkansas court agreed is stated in the legal conclusions portion of the trial court's opinion. Petition at 27a (opinion of the Chancery Court). There the trial court concluded that the exemption for high-volume users of long-distance service was rationally related to the legitimate legislative purpose of encouraging business and industry to locate in Arkansas. *Id.*

The Petitioner seems to be disturbed by the court's failure to linger on this point. The court did not engage in extensive analysis on how exactly a sales tax exemption might serve to promote the increase of commercial activity in the state. But that is not what the court is called upon to do under the law of equal protection as announced by this Court. *Carmichael* at 514–515. It need only conclude that the proposition that such an exemption would promote commercial activity in the state was more *rational* than *irrational*. Distinguishing degrees of rationality is the job of the legislature.

Furthermore, it seems the Petitioner would have the Court strike down the Arkansas decision because it fails to provide an exact match between subscribers to WATS and business users. This failure, the Petitioner argues, demonstrates the exemption's failure to adequately promote its purpose of promoting commercial activity in the state.

> However, the classification of whether to tax or not to tax interstate telephone services, based solely upon the regulatory rate structure for MTS interstate service, and WATS interstate service, does *not* further the objective of providing tax incentives to encourage businesses to stay or locate in Arkansas,

> because not *all* businesses are treated or taxed the same.

Petition at 24 (italics in original). The Petitioner wants to call heads and tails on the same toss. In order to get into the Equal Protection door, Petitioner argued that the WATS-MTS classification is tantamount to a classification dividing "large" consumers such as businesses from "small" consumers such as residential users. Petition Appendix at 24a. Once in the door, however, Petitioner argues that the statute should be stricken because it is too inefficient in this division.

The Arkansas and Wisconsin cases present radically different Equal Protection challenges to their respective statutes. The Wisconsin decision involved a classic retail-wholesale dispute that the Wisconsin Legislature attempted to resolve by a definitional distinction grounded in no real-world difference between the classes. The Arkansas decision in this case, by contrast, upheld a legislative policy exemption enacted to promote commercial activity in the state. It may be true, as Petitioner contends, that the exemption should have been made broader, or narrower, or not made at all. But the place to make such arguments is before the Arkansas Legislature, not the Arkansas courts, and not before this Court.

Conclusion

For the reasons stated herein, the Court should deny the Petition.

Respectfully Submitted,

October 30, 1991

Michael C. O'Malley
Mitchell, Williams, Selig,
Gates & Woodyard
320 West Capitol Avenue
Suite 1000
Little Rock, Arkansas 72201-3525
(501) 688-8800